

Vol. 1894

United States
Circuit Court of Appeals

For the Ninth Circuit

WALTER CHALAIRE,

Appellant,

CORNELL S. FRANKLIN

Appellee.

Transcript of Record

Upon Appeal from the United States Court
for China

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PAUL P. O'BRIEN,
CLERK

NO. 7753

United States
Circuit Court of Appeals
For the Ninth Circuit

WALTER CHALAIRE,

Appellant,


vs.

CORNELL S. FRANKLIN,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES :

MR. PAUL F. FAISON,

Shanghai, China,

for Plaintiff.

MR. CORNELL S. FRANKLIN,

Shanghai, China,

for Defendant.

In the United States Court for China

Cause No. 3628

Civil No. 1659

WALTER CHALAIRE,

Plaintiff,

vs.

CORNELL S. FRANKLIN,

Defendant.

[Endorsed]: Filed at Shanghai, China, February 1st, 1934.

COMPLAINT

For cause of action against the Defendant, Plaintiff respectfully shows the Court as follows:

1. Plaintiff is an American citizen and resides in the city of New York, United States of America, and Defendant is an American citizen and resides in the city of Shanghai, China.

2. At all times hereinafter mentioned Plaintiff and Defendant were attorneys-at-law duly admitted and qualified to practice law in Shanghai, China, and from May 1, 1924, to January 1, 1928 were engaged in the practice of law in Shanghai as partners, under an agreement entitling Plaintiff to 60% and Defendant to 40% of the profits of the partnership business.

3. On February 10th, 1927, Plaintiff being about to take a vacation in the United States entered into an agreement with Defendant at Shanghai, China, whereby it was agreed between them that Plaintiff would take a vacation to begin on or about the date of making said agreement, and ending on January 1st, 1928, it being therein provided between them that during the period of Plaintiff's vacation Plaintiff would continue to receive his 60% share of the profits of the partnership, and continue to be liable as such partner for any partnership obligations during said period of Plaintiff's vacation, and that if Plaintiff returned to China at the termination of the aforesaid vacation period, then Plaintiff and [1*] Defendant would continue their partnership business on the same basis as the aforesaid partnership theretofore existed, and which aforesaid agreement also provided in the alternative that if Plaintiff should elect to retire from the partnership and not return to China to resume the practice of law that Defendant, in consideration of Plaintiff refraining from continuing in the practice of law in China, and conveying, abandoning and relinquishing to Defendant the Plaintiff's rights and interests in the partnership business and the goodwill thereof and the other partnership property including law books, furniture, fixtures, and office paraphernalia, would pay to Plaintiff the sum of Shanghai Tls. 50,000.00, said payment to be made out of six-tenths of the profits to accrue to Defendant in the practice

*Page numbering appearing at the foot of page of original certified Transcript of Record.

of law on and after January 1st, 1928, the aforesaid agreement being in words and figures as follows:

“Shanghai, February 10, 1927.

C. S. Franklin, Esq.,
Shanghai.

Dear Cornell:

This will serve to confirm the arrangement which we made in connection with my impending departure.

I will take a vacation, ending on January 1, 1928, during which time I will continue to receive my share of the profits of the partnership and I presume I shall be liable as a partner for any partnership obligations during that period.

As you know, I may or I may not return to China; the matter is indefinite. If I return the matter is simple, we go on as we have before; if I do not, you are to pay me Tls. 50,000., to accrue as profits are made on and after January 1, 1928; 6/10ths of the profits to be paid to me until the sum of Tls. 50,000. has been paid, at which time the entire business shall be yours. I presume that [2] although my interest in the profits shall continue until the sum above mentioned is paid after January 1, 1928, my liability shall cease at that time.

If the foregoing is in accordance with your understanding, please sign the same.

Faithfully yours

WALTER CHALAIRE

C. S. FRANKLIN.”

4. Pursuant to the terms of the aforesaid agreement, Plaintiff during the month of November 1927,

elected to retire from the aforesaid partnership and refrain from practicing law in China commencing as of January 1, 1928, and during said month of November 1927 so notified Defendant of his election, and effective on and as of January 1, 1928, conveyed, abandoned and relinquished to Defendant Plaintiff's rights and interests in the partnership business, and the goodwill thereof, and the other partnership property including law books, furniture, fixtures, and office paraphernalia, and commencing on January 1, 1928, Plaintiff has always refrained from practicing law in China, and has performed all things on his part to be performed pursuant to and by virtue of the aforesaid agreement, and by reason of all of the foregoing Defendant became obligated, pursuant to the terms of the aforesaid agreement, to pay to the Plaintiff out of six-tenths of the profits to accrue to Defendant in the practice of law on and after January 1, 1928, the sum of Shanghai Tls. 50,000.00.

5. Defendant has continued to practice law in China from the 1st day of January, 1928, to the present day, and has pursuant to the terms of the aforesaid agreement acquired, received and possessed all of the profits, rights and interests in the aforesaid partnership business and the goodwill thereof, and the partnership property, including law books, furniture, fixtures, and office paraphernalia, and the benefits accruing by reason of Plaintiff refraining from practicing law in China. [3]

6. From January 1, 1928, to March 31, 1928, inclusive, Defendant made as profits in the practice

of law at Shanghai, China, the sum of Shanghai Tls. 3,709.80, and pursuant to the terms of the aforesaid agreement and in part performance thereof paid to Plaintiff six-tenths of the aforesaid sum of Shanghai Tls.3,709.80, which six-tenths was equal to Shanghai Tls.2,225.88, and from April 1, 1928, to April 30, 1930, inclusive, Defendant made as profits in the practice of law at Shanghai, China, a sum of money six-tenths of which is more than the sum of Shanghai Tls.47,774.12, and Defendant therefore and by reason thereof thereupon became obligated to Plaintiff in the sum of Shanghai Tls.47,774.12, being the unpaid portion of the sum of Shanghai Tls.50,000.00 which Defendant was obligated to pay to Plaintiff pursuant to the terms of the aforesaid agreement.

7. After April 30, 1930, Plaintiff has often demanded payment from Defendant of said Shanghai Tls.47,774.12, but Defendant has always refused to pay the same or any part thereof.

WHEREFORE, Plaintiff prays judgment against Defendant for Tls.47,774.12 with legal interest thereon from April 30, 1930, and for the costs of this action.

(Signed) PAUL F. FAISON
Attorney for Plaintiff

United States of America
Extraterritorial Jurisdiction in China
Consular District of Shanghai—ss:

PAUL F. FAISON being first duly sworn deposes and says that he is the attorney for the Plaintiff in the above entitled action, that he has read

and signed the foregoing complaint and knows the contents thereof, and that the facts therein stated are true; that the reason this verification is made by him and not by the Plaintiff is that Plaintiff is absent [4] from China and from the jurisdiction of this court and there is no person other than affiant who is capable of verifying the complaint.

(Signed) PAUL F. FAISON

Subscribed and sworn to before me this 1st day of February, 1934, at Shanghai, China.

(Signed) WILLIAM T. COLLINS, Clerk
United States Court for China. [5]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, February 21, 1934.

ANSWER

Now comes the defendant above named and for answer unto the plaintiff's complaint admits, denies and alleges as follows:

1: The defendant admits the allegations contained in paragraphs 1 and 2 of the plaintiff's complaint.

2: For answer unto paragraph 3 of the plaintiff's complaint the defendant admits the agreement between the parties hereto as quoted in said paragraph 3 but denies that the consideration for the agreement of the defendant therein was plaintiff refraining from continuing in the practice of law in China and conveying, abandoning and relinquish-

ing to defendant the plaintiff's rights and interests in the partnership business and the goodwill thereof and the other partnership property including law books, furniture, fixtures and office paraphernalia.

3: Defendant denies the allegations contained in paragraph 4 of the plaintiff's complaint.

4: For answer unto paragraph 5 of the plaintiff's complaint the defendant admits that he has practiced law in China from January 1, 1928 to date but denies the other allegations in said paragraph contained. [6]

5: For answer unto paragraph 6 of the plaintiff's complaint the defendant admits having made as profit in the practice of law at Shanghai, China, the sum of Shanghai \$3,709.50 from January 1, 1928 to March 31, 1928 inclusive and admits having paid to plaintiff 6/10 thereof pursuant to the terms of the aforesaid agreement and in part performance thereof, and further admits having made as profit in the practice of law at Shanghai, China, a sum of money 6/10 of which is more than the sum of Shanghai \$47,774.12 from April 1, 1928, to April 30, 1930, but denies the other allegations in said paragraph contained.

6: For answer unto paragraph 7 of the plaintiff's complaint the defendant admits the allegations therein contained and further alleges that on March 31, 1928 he informed the plaintiff in writing that he, the defendant, would not make further payments to plaintiff under the aforesaid agreement.

7: For further answer unto plaintiff's complaint the defendant alleges that he agreed to pay to plain-

tiff 60 per cent of the net profits of the law practice or business carried on in China after January 1, 1928 by the defendant under the firm name and style of Chalaire & Franklin until a total sum of Shanghai \$50,000.00 had been paid; that he duly paid to plaintiff such percentage of the net profit of Chalaire & Franklin until March 31, 1928, when the defendant ceased the practice of law under the firm name and style of Chalaire & Franklin and abandoned the goodwill attaching to the name of Chalaire & Franklin; and that thereafter he duly paid to plaintiff the plaintiff's share of the value of the law books, furniture, fixtures and office paraphernalia of the former partnership of Chalaire & Franklin. [7]

FIRST SEPARATE AND DISTINCT DEFENSE

For a further, separate and distinct defense to plaintiff's complaint the defendant alleges:

1: The defendant repeats the admissions, denials and allegations contained in paragraphs 1 to 7 inclusive above.

2: The defendant further alleges that there was no consideration for his execution of the aforesaid agreement or for his undertakings therein contained.

SECOND SEPARATE AND DISTINCT DEFENSE

For a further, separate and distinct defense to plaintiff's complaint the defendant alleges:

1: The defendant repeats the admissions, de-

nials and allegations contained in paragraphs 1 to 7 inclusive above.

2: The defendant further alleges that if there was legal consideration for his execution of the aforesaid agreement and for his undertakings therein contained, an important part of such consideration was plaintiff's promise to secure in the United States, lucrative legal business and send the same to the defendant in China.

3: The plaintiff failed to make good his promise to send lucrative legal business to the defendant from the United States and by reason of such thereof there was a failure of consideration for defendant's undertakings in said agreement contained.

THIRD SEPARATE AND DISTINCT DEFENSE

For a further, separate and distinct defense to plaintiff's complaint the defendant alleges:

1: The defendant repeats the admissions, denials and allegations contained in paragraphs 1 to 7 inclusive above. [8]

2: The defendant further alleges that the Statute of Limitations has run against the claim hereby sued upon.

* * * * *

WHEREFORE defendant prays that plaintiff's complaint be dismissed at plaintiff's cost.

Dated at Shanghai, China, this 21st day of February, 1934.

(Signed) CORNELL S. FRANKLIN

United States of America
Extraterritorial Jurisdiction in China
Consular District of Shanghai—ss:

Cornell S. Franklin being first duly sworn deposes and says: That he is the defendant in the above entitled action, that he has read the above and foregoing Answer to the Complaint of the plaintiff herein and knows the contents thereof, and alleges that the same is true of his own knowledge.

(Signed) CORNELL S. FRANKLIN

Subscribed and sworn to before me this 21st day of February, 1934.

(Signed) W. T. COLLINS

Clerk of the United States Court for China

L. T. KENAKE

Assistant Clerk [9]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, June 18th, 1934.

STIPULATION

It is hereby stipulated by and between the parties hereto that Plaintiff may file the amended complaint attached hereto, and service of a copy thereof is hereby accepted.

Shanghai, China, June 15th, 1934.

(Signed) P. F. FAISON

Attorney for Plaintiff

C. S. FRANKLIN

Defendant. [10]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China June 18th, 1934.

AMENDED COMPLAINT

For cause of action against the Defendant, Plaintiff respectfully shows the Court as follows:

1. Plaintiff is an American citizen and resides in the city of New York, United States of America, and Defendant is an American citizen and resides in the city of Shanghai, China.

2. At all times hereinafter mentioned Plaintiff and Defendant were attorneys-at-law duly admitted and qualified to practice law in Shanghai, China, and from May 1, 1924, to January 1, 1928, were engaged in the practice of law in Shanghai as partners, under an agreement entitling Plaintiff to 60% and Defendant to 40% of the profits of the partnership business.

3. On or about February 10, 1927, Plaintiff and Defendant entered into an agreement at Shanghai, China, in words and figures as follows:

“Shanghai, February 10, 1927.

C. S. Franklin, Esq.,
Shanghai.

Dear Cornell:

This will serve to confirm the arrangement which we made in connection with my impending departure.

I will take a vacation, ending on January 1, 1928, during which time I will continue to receive my share of the profits of the partnership and I pre-

sume I shall be liable as a partner for any partnership obligations during that period. [11]

As you know, I may or I may not return to China; the matter is indefinite. If I return the matter is simple, we go on as we have before; if I do not, you are to pay me Tls. 50,000., to accrue as profits are made on and after January 1, 1928; 6/10th of the profits to be paid to me until the sum of Tls. 50,000. has been paid, at which time the entire business shall be yours. I presume that although my interest in the profits shall continue until the sum above mentioned is paid after January 1, 1928, my liability shall cease at that time.

If the foregoing is in accordance with your understanding, please sign the same.

Faithfully yours,

Walter Chalaire

C. S. Franklin.”

4. That Plaintiff did during the month of November, 1927, notify Defendant that he, Plaintiff, would not return to China, and that Plaintiff thereafter did not return to China nor has he since that time practiced law in China.

5. That Defendant has continued to practice law in China from the first day of January, 1928, to the present day.

6. From January 1st, 1928, to March 31st, 1928, inclusive, defendant made as profits in the practice of law at Shanghai, China, the sum of Shanghai Tls. 3,709.80, and pursuant to the terms of the aforesaid agreement and in part performance thereof paid to plaintiff six-tenths of the aforesaid sum

of Shanghai Tls. 3,709.80, which six-tenths was equal to Shanghai Tls. 2,225.88, and from April 1st, 1928, to April 30th, 1930, inclusive, defendant made as profits in the practice of law at Shanghai, China, a sum of money six-tenths of which is more than the sum of Shanghai Tls. 47,774.12, and defendant therefore and by reason thereof thereupon became obligated to plaintiff in the sum of Shanghai Tls. 47,774.12, being the unpaid portion of the sum of Shanghai Tls. 50,000.00 which defendant was obligated to pay to plaintiff pursuant to the terms of the aforesaid agreement. [12]

7. After April 30, 1930, plaintiff has often demanded payment from defendant of said Shanghai Tls. 47,774.12, but defendant has always refused to pay the same or any part thereof.

WHEREFORE, Plaintiff prays judgment against defendant for Tls. 47,774.12 with legal interest thereon from April 30, 1930, and for the costs of this action.

(Signed)

PAUL F. FAISON
Attorney for Plaintiff.

United States of America
Extraterritorial Jurisdiction in China
Consular District of Shanghai—ss:

PAUL F. FAISON being first duly sworn deposes and says that he is the attorney for the plaintiff in the above entitled action, that he has read and signed the foregoing complaint and knows the contents thereof, and that the facts therein stated are true; that the reason this verification is

made by him and not by the plaintiff is that plaintiff is absent from China and from the jurisdiction of this court and there is no person other than affiant who is capable of verifying the complaint.

(Signed) PAUL F. FAISON

Subscribed and sworn to before me this 18th day of June, 1934, at Shanghai, China.

(Signed) WILLIAM T. COLLINS

Clerk, United States Court
for China.

(Signed) L. T. KENAKE

Asst. Clerk [13]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 30th day of June, 1934.

ANSWER TO AMENDED COMPLAINT

Now comes the defendant above named and for answer unto the plaintiff's amended complaint admits, denies and alleges as follows:

1. The defendant admits the allegations contained in paragraphs 1, 2, 3, 4, 5, and 7 of the plaintiff's amended complaint.

2. For answer unto paragraph 6 of the plaintiff's amended complaint the defendant admits having made as profit in the practice of law at Shanghai, China, the sum of Shanghai Tls. 3,709.50 from January 1st, 1928, to March 31st, 1928, inclusive, and admits having paid to plaintiff the 6/10 thereof pursuant to the terms of the agree-

ment set forth in paragraph 3 of the plaintiff's amended complaint and in part performance of said agreement, and further admits having made as profit in the practice of law at Shanghai, China, a sum of money 6/10 of which is more than the sum of Shanghai Tls. 47,774.12 from April 1, 1928, to April 30, 1930, but denies the other allegations in said paragraph contained.

3. For further answer unto plaintiff's complaint the defendant alleges that he agreed to pay to plaintiff 60% of the net profits of the law practice or business carried on in China after January 1, 1928, by the defendant under the firm name and style of Chalaire & Franklin until a total sum of Shanghai [14] Tls. 50,000 had been paid; that he duly paid to plaintiff such percentage of the net profit of the law practice or business carried on by him under the firm name and style of Chalaire & Franklin until March 31, 1928, when the defendant ceased the practice of law under the firm name and style of Chalaire & Franklin and abandoned the goodwill attaching to the name of Chalaire & Franklin.

FIRST SEPARATE AND DISTINCT DEFENSE

For a further, separate and distinct defense to plaintiff's amended complaint the defendant alleges:

1. The defendant repeats the admissions, denials and allegations contained in paragraphs 1 to 3 inclusive above.

2. The defendant further alleges that there was no consideration for his execution of the agreement

contained in paragraph 3 of the plaintiff's amended complaint or for his undertakings contained in said agreement.

SECOND SEPARATE AND DISTINCT DEFENSE

For a further, separate and distinct defense to plaintiff's amended complaint the defendant alleges:

1. The defendant repeats the admissions, denials and allegations contained in paragraphs 1 to 3 inclusive above.

2. The defendant further alleges that if there was legal consideration for his execution of the agreement contained in paragraph 3 of the plaintiff's amended complaint and for his undertakings in said agreement contained, an important part of such consideration was plaintiff's promise to secure in the United States, lucrative legal business and send the same to the defendant in China.

3. The plaintiff failed to make good his promise to send lucrative legal business to the defendant from the United States and by reason of such, thereof there was a failure of consideration for defendant's undertakings in said agreement contained. [15]

THIRD SEPARATE AND DISTINCT DEFENSE

For a further, separate and distinct defense to plaintiff's amended complaint the defendant alleges:

1. The defendant repeats the admissions, denials and allegations contained in paragraphs 1 to 3 inclusive above.

2. The defendant further alleges that the Statute of Limitations has run against the claim hereby sued upon.

* * * * *

WHEREFORE defendant prays that plaintiff's amended complaint be dismissed at plaintiff's cost.

Dated at Shanghai, China, this 30th day of June, 1934.

(Signed) CORNELL S. FRANKLIN

United States of America
Extraterritorial Jurisdiction in China
Consular District of Shanghai—ss.

CORNELL S. FRANKLIN being first duly sworn deposes and says: That he is the defendant in the above entitled action, that he has read the above and foregoing Answer to the Amended Complaint of the plaintiff herein and knows the contents thereof, and alleges that the same is true of his own knowledge.

(Signed) CORNELL S. FRANKLIN

Subscribed and sworn to before me this 30th day of June, 1934.

(Signed) WILLIAM T. COLLINS

Clerk of the United States Court for China

(Signed) L. T. KENAKE, Asst. Clerk [16]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 14th day of August, 1934.

MOTION FOR JUDGMENT ON THE
PLEADINGS

To the Clerk of the United States Court for China
and Cornell S. Franklin, Esquire—

Please take notice that the Plaintiff will on the 15th day of September, 1934, at the United States Court for China in the city of Shanghai, China, at the hour of ten o'clock A. M. of said day, or as soon thereafter as counsel can be heard, move the Honorable Milton J. Helmick, the Judge of said Court, for judgment on the pleadings in the above entitled action, on the ground that defendant's answer to plaintiff's amended complaint fails to raise an issue of fact for decision by the court.

This motion will be based upon the pleadings on file in said action.

Dated at Shanghai, China, this 14th day of August, 1934.

P. F. FAISON
Attorney for Plaintiff [17]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, September 14, 1934.

OPINION

Plaintiff sued defendant for breach of contract and defendant filed an answer containing new mat-

ter by way of affirmative defense, whereupon both parties moved for judgment on the pleadings. Among other matters of defense, defendant pleads the bar of the Statute of Limitations, and consequently that question must be determined at the outset. According to the allegations of the complaint, plaintiff's cause of action accrued on or before April 20th, 1930. Whether or not plaintiff's cause of action is barred depends upon whether the 3-year period of the District of Columbia Code or the 6-year period of the Consular Court Regulations of 1864 is the law of this jurisdiction. Plaintiff argues, and it is assumed here, that the matter of limitation of actions is not substantive law but only procedural or remedial law, which could properly be the subject of Consular Court Regulations.

The confusion which has existed on this question in the past was due to the decision in the early case of *United States vs. Engelbracht*, 1 *Extraterritorial Cases*, 169, which held that Consular Court Regulations prevailed, even over inconsistent acts of Congress not expressly relating to this juris- [18] diction, because *United States Revised Statutes*, Section 4118 made the regulations binding "until annulled or modified by Congress."

The rules, which were promulgated by the American Minister to China in 1864 under authority of this Statute, are quite meagre and apply only to actions at law and not to suits in equity. Under the act creating this Court they were carried over "so far as practicable" and could be modified or supplemented by the Judge, but no modern Court

of Record could very well function with the obsolete procedural equipment they furnish. Even during the existence of the Consular Court system, before the creation of this Court, the particular rule on limitation of actions which is involved here was considered by no less distinguished an authority than Mr. Bayard, Secretary of State, to be a rule of Court and not a statutory mandate, and that it could be varied as justice might require.—See Hinckley's *American Consular Jurisdiction in the Orient*, p. 55.

The basic thing to be remembered is that by United States Revised Statutes, Section 4083-4130, the laws of the United States, the Common Law and the Law of Equity and Admiralty were extended to this jurisdiction, and that this Court, as the successor of the Consular Courts, administers all these laws. [19] In making this blanket extension, Congress did not except the procedural field of law. It is true, Congress in creating the United States Court for China endowed it with the doubtful benefit of existing Consular Court Rules of procedure, but the grant was qualified by the words "so far as practicable," and it can not be thought the Regulations were made the exclusive procedural law of the Court. In the noted case of *Biddle vs. United States*, the United States Circuit Court of Appeals of the 9th Circuit ruled that the statute laws of the District of Columbia are among the laws of the United States extended to this jurisdiction, and since that decision the District of Columbia Code Statute of Limitations passed in 1901, is

a law of the United States and an expression of Congressional will on the subject. That this statute, apart from the conflict with the regulation, is wholly applicable and suitable to this jurisdiction, is not questioned, but it is argued that Congress did not have China in mind when enacting it and therefore there was no Congressional intention to override the Consular Court rule in force here. The same thing could be said of most of the laws of the United States which have been extended. It cannot be supposed that an empirical Consular Court Regulation can stand if contrary to a law of the United States, and it must be held that laws of the United States not unsuitable to this jurisdiction prevail a fortiori.

In creating the United States Court for China with a complete staff, a Judge, "a District Attorney, a Marshal and a Clerk, with authority possessed by corresponding officers of the District Courts of the United States," Congress at least created something in the image of a Federal Court. The Federal equity rules promulgated by the Supreme Court of the United [20] States under authority of Congress have always governed the practice of this Court on the equity side. The last Congress passed an act giving the Supreme Court additional authority to make procedural rules for Federal Courts for law cases as well, and in a short time the procedure of all Federal Courts, both on the law and equity sides, will be prescribed completely by rules of the Supreme Court. When this is accomplished, uncertainty as to procedure in the

United States Court for China should be ended. No one, it is hoped, will have the temerity to suggest these rules will be barred by the existence of the venerable Consular Court Rules.

Since it is held plaintiff's cause of action is barred by the District of Columbia Statute of Limitations in force here, it is unnecessary to consider the other issues raised by the motions. Complaint will be dismissed.

(Signed) MILTON J. HELMICK
Judge [21]

In the United States Court for China

Cause No. 3628

Civil No. 1659

WALTER CHALAIRE, Plaintiff,

vs.

CORNELL S. FRANKLIN, Defendant.

[Endorsed]: Filed at Shanghai, China, this 26th day of November, 1934.

JUDGMENT

This cause came on regularly for hearing upon plaintiff's motion for judgment upon the pleadings, and the defendant in open court having also moved for judgment upon the pleadings, to which plaintiff then and there objected, and the court having heard arguments of counsel and having filed its Opinion herein, and now being fully advised finds that the

judgment justified by the pleadings should go for the defendant to which plaintiff excepts.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the complaint of plaintiff be dismissed, that defendant go hence without day, and have his costs herein expended, to which plaintiff excepts.

MILTON J. HELMICK
Judge. [22]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 15th day of December, 1934.

EXCEPTION TO JUDGMENT DISMISSING
COMPLAINT

Now comes the Plaintiff by his attorney, Paul F. Faison, and excepts to the Judgment of the Court entered herein on the 26th day of November, 1934, for the following reasons:

1. That the Court erred in considering, over Plaintiff's objection, defendant's oral motion for judgment on the pleadings made during the progress of the hearing of plaintiff's written motion for judgment on the pleadings.

2. That the Court erred in considering defendant's third special defense for the reason that defendant failed to allege in said plea the facts upon which he relied to show when plaintiff's cause of action accrued, or when the statute of limitations commenced to run, or what statute he relied upon as a bar.

3. That the Court erred in holding that section 341, Title 24, of the District of Columbia Code promulgated in 1930, (being section 1265 of the District of Columbia Code of 1901), providing that no action shall be brought—upon any simple contract, express or implied,—after three years from the time when the right to maintain such action shall have accrued, is the law of this jurisdiction.

4. The Court erred in not holding that section 83 of the Consular Court Regulations, prescribing that civil actions based on a written promise, contract, or instrument must be [23] commenced within six years after the cause of action accrues, and other civil actions within two years, is the law of this jurisdiction.

5. That the Court erred in holding that plaintiff's cause of action accrued on or before April 20, 1930.

6. That the Court erred in inferring and concluding that the allegations contained in the amended complaint were inconsistent with the plaintiff's cause of action arising or the statute of limitations commencing to run within three years immediately preceding the filing of the complaint or the amended complaint herein.

7. That the Court erred in rendering judgment against the plaintiff on the pleadings.

8. That the Court erred in not giving plaintiff judgment against defendant on the pleadings.

Dated at Shanghai, China, this 14th day of December, 1934.

P. F. FAISON

Attorney for the Plaintiff. [24]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 21st day of December, 1934.

PETITION FOR APPEAL

The above named, Walter Chalaire, considering himself aggrieved by the judgment made and entered on the 26th day of November, 1934, in the above entitled cause, does hereby appeal from said judgment to the United States Circuit of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

P. F. FAISON

Attorney for Plaintiff [25]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 21st day of December, 1934.

ASSIGNMENT OF ERRORS

Comes now the said WALTER CHALAIRE, plaintiff in the above cause, and files the following assignment of errors upon which he will rely upon the prosecution of the appeal herewith petitioned

for in said cause from the judgment of this Court entered on the 26th day of November, 1934:

1. The Court erred in considering, over Plaintiff's objection, defendant's oral motion for judgment on the pleadings made during the progress of the hearing of plaintiff's motion for judgment on the pleadings.

2. The Court erred in considering defendant's third special defense for the reason that defendant failed to allege in said plea the facts upon which he relied to show when plaintiff's cause of action accrued, or when the statute of limitations commenced to run, or what statute he relied upon as a bar.

3. The Court erred in holding that section 341, Title 24, of the District of Columbia Code promulgated in 1930, (being section 1265 of the District of Columbia Code of 1901), providing that no action shall be brought—upon any simple contract, express or implied,—after three years from the time when the right to maintain such action shall have accrued, is the law of this jurisdiction. [26]

4. The Court erred in not holding that section 83 of the Consular Court Regulations, prescribing that civil actions based on a written promise, contract, or instrument must be commenced within six years after the cause of action accrues, and other civil actions within two years, is the law of this jurisdiction.

5. The Court erred in holding that plaintiff's cause of action accrued on or before April 20, 1930.

6. The Court erred in inferring and concluding

that the allegations contained in the amended complaint were inconsistent with the plaintiff's cause of action arising or the statute of limitations commencing to run within three years immediately preceding the filing of the complaint or the amended complaint herein.

7. The Court erred in rendering judgment against the plaintiff on the pleadings.

8. The Court erred in not giving plaintiff judgment against defendant on the pleadings.

WHEREFORE, plaintiff prays that the said judgment may be reversed and for such other and further relief as to the Court may seem just and proper.

P. F. FAISON

Attorney for Plaintiff. [27]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 21st day of December, 1934.

ORDER ALLOWING APPEAL

This day came the plaintiff by his attorneys and presented to the Court his petition for an allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, which petition upon consideration by the Court is hereby allowed, and the Court allows an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, upon the filing of a bond in the sum of United States currency Dollars Two Hundred and Fifty

(U. S. \$250.00) with good and sufficient security to be approved by the Court.

By the Court
MILTON J. HELMICK
Judge [28]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 31st day of December, 1934.

APPEAL BOND

KNOW ALL MEN BY THESE PRESENTS: That we, Walter Chalaire, as principal, and Columbia Casualty Company of New York, as surety, are held and firmly bound unto Cornell S. Franklin, in the full and just sum of United States Dollars Two Hundred and Fifty (U. S. \$250.00) to be paid unto said Cornell S. Franklin, his heirs, executors, administrators, successors or assigns, to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals, and dated this 31st day of December, 1934.

WHEREAS, lately, at the United States Court for China, in a suit depending in said Court between Walter Chalaire, plaintiff, and Cornell S. Franklin, defendant, a judgment was entered against the said Walter Chalaire and the said Walter Chalaire has petitioned for and been allowed by said Court an appeal to be made to the United

States Circuit Court of Appeals for the Ninth Circuit and a citation has been issued and directed to the said Cornell S. Franklin, citing him to appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City and County of San Francisco in the Northern District of the State of California, thirty (30) days from and after the date of this citation. [29]

NOW, the condition of the above obligation is such that if the said Walter Chalaire shall prosecute said appeal to effect and answer all costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

WALTER CHALAIRE, Principal
By: PAUL F. FAISON
His Attorney in Fact

COLUMBIA CASUALTY COMPANY OF NEW YORK, Surety.
(Signed) By: W. J. GULLIVER

ACKNOWLEDGMENT

United States of America
Extraterritorial Jurisdiction in China,
Consular District of Shanghai—ss.

The affiant, Paul F. Faison, being first duly sworn, deposes and says that he is the person who executed the foregoing instrument as Attorney in Fact of Walter Chalaire, that he was duly authorized thereunto by the said Walter Chalaire,

and that the execution of this bond is the free act and deed of the said Walter Chalaire.

PAUL F. FAISON.

IN WITNESS WHEREOF, I have hereunto set my hand and affix my official seal at Shanghai, China, the day and year first above written.

WILLIAM T. COLLINS

Clerk of the United States Court for China

L. T. KENAKE, Asst. Clerk. [30]

ACKNOWLEDGMENT

United States of America,
Extraterritorial Jurisdiction in China,
Consular District of Shanghai.—ss.

The affiant, William James Gulliver, being first duly sworn, deposes and says that he is the accident manager, for China, of the Columbia Casualty Company of New York; that the same is an American company incorporated under the laws of the State of New York, and doing business in the City of Shanghai, China; and under the Articles of Incorporation of said company it is authorized to execute such an instrument in the name of the company; and that he acknowledges the execution of the foregoing bond to be the free act of said company for the purposes therein expressed.

(Signed) W. J. GULLIVER.

IN WITNESS WHEREOF, I have hereunto set my name and affix my official seal at Shanghai, China, the day first above written.

WILLIAM T. COLLINS

Clerk of the United States Court for China.

L. T. KENAKE, Asst. Clerk

The foregoing bond is hereby approved this 31st day of December, 1934.

MILTON J. HELMICK

Judge of the United States

Court for China. [31]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 24th day of December, 1934.

CITATION ON APPEAL

United States of America,

United States Court for China.—ss.

The President of the United States to Cornell S. Franklin:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City and County of San Francisco, in the Northern District of the State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal from the United States Court for China, in a suit wherein Walter Chalaire is appellant and you are appellee, to show cause, if any there be, why

the judgment rendered against said Walter Chaire, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Milton J. Helmick, Judge of the United States Court for China, this twenty-fourth day of December, 1934, and in the 158th year of the Independence of the United States of America.

[Seal]

MILTON J. HELMICK
Judge
United States Court for China

Service copy of the foregoing citation is acknowledged by me this 27th day of December, 1934.

CORNELL S. FRANKLIN
Defendant [32]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 21st day of December, 1934.

ORDER

For satisfactory reasons appearing to the Court, the time for filing the record in this case in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the appeal sued out, is extended until the 15th day of February, 1935.

By the Court
MILTON J. HELMICK
Judge [33]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 3rd day of January, 1935.

PRAECIPE FOR TRANSCRIPT OF RECORD

To Clerk of the above named Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other papers and exhibits, to wit:

1. Plaintiff's complaint.
2. Defendant's answer.
3. Stipulation allowing filing of amended complaint.
4. Plaintiff's amended complaint.
5. Defendant's answer to amended complaint.
6. Plaintiff's motion for Judgment on the pleadings.
7. Opinion of the Court.
8. Judgment of Court.
9. Exception to judgment of Court.
10. Petition for allowance of appeal.
11. Assignment of errors.
12. Order allowing appeal.
13. Appeal bond.
14. Citation on appeal.
15. Order extending time for filing record of appeal.
16. This praecipe.

P. F. FAISON
Attorney for Plaintiff [34]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 5th day of January, 1935.

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,
Extraterritorial Jurisdiction in China,
Consular District of Shanghai.—ss.

In accordance with the order allowing appeal, a copy of which is set forth in the foregoing, I, William T. Collins, Clerk of the United States Court for China, hereby transmit a true copy of the record, assignment of errors, and other documents filed in the above-entitled cause, consisting of pages 1 to 35, inclusive, lately pending in the United States Court for China, under my hand and the seal of said Court.

And I do certify that the costs of preparation of this record are nil, the said record having been prepared by the plaintiff (plaintiff in error) herein.

WITNESS my official signature and the seal of the said United States Court for China, at the City of Shanghai, China, within the jurisdiction of said Court, this 5th day of January, 1935.

[Seal]

WILLIAM T. COLLINS
Clerk, United States Court
for China [35]

[Endorsed]: Transcript of Record. Filed January 24, 1935. Paul P. O'Brien, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

